FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

Nick Cascio ..... Petitioner,

v. No. 376

State of Arkansas ..... Respondent.

REPLY TO PETITION AND BRIEF OF PETITIONER, NICK CASCIO, FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NICK CASCIO ..... *Petitioner*

v. No. 254

STATE OF ARKANSAS ..... *Respondent*

BRIEF IN REPLY TO PETITIONER'S BRIEF AND PETITION

I

The Statute Is Not Unconstitutional

Under the above heading, petitioner argues that Section 3063 of Pope's Digest of the Statutes of Arkansas for the violation of which he was convicted is unconstitutional.

This Section is as follows:

> "Any person who makes, mends, designs or sets up, or who has in his custody or concealed about his person, any tool, false key, lock pick, bit, nippers, fuse, force screw, punch, drill, jimmy, bit, or any material, implement or other mechanical device whatsoever, adapted, designed or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door shutter, or window of a building of

any kind, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two years, nor more than ten years. Act. February 17, 1915, p. 208."

A conviction under this Statute has been before the Arkansas Supreme Court four times.

Satterfield v. *State*, 174 Ark. 733;

Jones v. *State*, 181 Ark. 336;

Prather v. *State*, 191 Ark. 903, and

Cascio v. *State* (this case), Printed Record 142.

The first two cases were reversed by the Arkansas Supreme Court and the last two affirmed.

There is nothing in said Statute that offends against Amendment XIV, U. S. Constitution as contended by petitioner.

> "Courts are not authorized to strike down a law enacted by the General Assembly unless it appears that the law contravenes some provision of the constitution; and, in case of doubt as to the constitutionality of a statute, the doubt must be resolved in favor of the Validity of the Law."

Fugett v. *State*, 208 Ark. 979, 188 S.W. (2d) 641, and cases there cited;

Moore v. *Alexander*, 85 Ark. 171, 107 S.W. 395;

Wells Fargo & Co. v. *Crawford*, 63 Ark. 576, 40 S.W. 710, 37 L.R.A. 371;

Ex Parte Byles, 93 Ark. 612, 126 S.W. 94, 32 S. Ct. 836, 56 Law Ed. 1270;

St. L. I. M. & S. Ry. Co. v. *State*, 99 Ark. 1, 136 S.W. 938, Am. Cas. 1913B 141;

State v. *Chicago Mill & Lbr. Co.* 184 Ark. 1011, 45 S.W. (2d) 26;

Dozier v. *Ragsdale*, 186 Ark. 654, 55 S.W. (2d) 779.

II

Information Can Be Substituted for Grand Jury Indictment

Petitioner cites under this above heading Amendment 21, Arkansas Constitution, and Amendments 5 and 14, U. S. Constitution, in support of the contention that a person can not be charged by information when the offense is a felony.

This contention has been decided against petitioner both by the Arkansas Supreme Court and the Supreme Court of the United States.

Penton v. *State*, 194 Ark. 503, 109 S.W. (2d) 131;

Smith, et al v. *State*, 194 Ark. 1041, 110 S.W. (2d) 24;

Deatherage v. *State*, 194 Ark. 513;

Brockelhurst v. *State*, 195 Ark. 67, 111 S.W. (2d) 527;

Hurtado v. *California*, 110 U.S. 516, 28 Law Ed. 232, 4 S. Ct. 111;

Bollen v. *Nebraska*, 176 U.S. 83, 44 Law Ed. 382, 20 S. Ct. 287;

Gaines v. *Washington*, 277 U.S. 81, 72 Law Ed. 793, 48 S. Ct. 468.

III

Restriction of Petitioner's Rights in Jury Selection, Not Unconstitutional

There could be no possible violation of any constitutional right of the petitioner in refusing to allow him to excuse two jurors formerly accepted, without any reason therefor and after the State had exhausted its peremptory challenges. The trial Court is given discretion in such matters and there must be shown an abuse thereof before any relief is granted. There has been no such abuse shown and in reality the record abundantly supports the ruling of the trial court.

Allen v. *State*, 70 Ark. 337, 68 S.W. 28;

Jones v. *State*, 166 Ark. 290, 265 S.W. 974;

Brust v. *State*, 153 Ark. 348, 240 S.W. 1079;

IV

No Evidence of Petitioner's Guilt, and Directed Verdict of Acquittal Should Not Have Been Given as a Matter of Law

Here petitioner argues there was no evidence to support the verdict and sentence pronounced thereon and that since there was none, his constitutional rights were invaded. There was evidence to support the verdict and sentence pronounced.

The trial court properly (printed Record pages 123 to 126) and in line with the decision of the Arkansas Su-

preme Court in case of *Prather* v. *State*, 191 Ark. 903, instructed the jury. The jury passed upon the evidence in the light of these instructions and the Arkansas Supreme Court (printed Record 142) affirmed the case holding the evidence was sufficient and met the test prescribed an dfollowed in weighing evidence upon appeal from the verdict of a jury to the Supreme Court of the State.

It might assist the Court here to state the rule and give citation of a few of the multitude of cases supporting it.

> "On appeal, the testimony will be viewed in the light most favorable to the State.
>
> The Jury's verdict, when supported by substantial evidence, is binding on appeal."

Coffer v. *State*, 211 Ark. 1010, 204 S.W. (2d) 376;

Brown v. *State*, 208 Ark. 180, 185 S.W. (2d) 274;

Reynolds v. *State*, 211 Ark. 383, 200 S.W. (2d) 806;

Benson v. *State*, 212 Ark. 905, 208 S.W. (2d) 767;

Duty v. *State*, 212 Ark. 890, 208 S.W. (2d) 162.

v

Prosecuting Attorney's Argument Does Not Make Trial Unfair

The testimony of witnesses for the State was credible and the Statement of the Prosecuting Attorney was true and justifiable.

Ingle v. *State*, 198 S.W. (2d) 996.

However, when his statement was objected to, the Court told the jury not to consider it.

There could then be no constitutional violation here of any rights of petitioner.

Moreover, broad discretion is given trial judges in the control of arguments and the Arkansas Supreme Court found, in this case, no abuse of that discretion.

Wilson v. *State*, 126 Ark. 354, 190 S.W. 441;

Walker v. *State*, 138 Ark. 517, 212 S.W. 319;

Rosslat v. *State*, 162 Ark. 340, 258 S.W. 348;

Kelley v. *State*, 175 Ark. 1170, 1 S.W. (2d) 46;

Hicks v. *State*, 193 Ark. 46, 97 S.W. (2d) 900;

Holcomb v. *State*, 203 Ark. 640, 158 S.W. (2d) 471.

CONCLUSION

We do not think and so contend that there was or is any violation of any constitutional right of the petitioner and that he did not have a fair and impartial trial. No Federal question is here presented and no ground for the issuance of a writ of Certiorari to the Supreme Court of the State of Arkansas. We respectfully ask that the prayer of the petition be disallowed.

Respectfully submitted

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The State of Arkansas